UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

BENJAMIN WALKER,

Plaintiff,

v.

Case No. 2:05-cv-142
HON. ROBERT HOLMES BELL

UNKNOWN STASEWICH,

Defendant.
_____/

REPORT AND RECOMMENDATION

Plaintiff Benjamin Walker, an inmate at the Alger Maximum Correctional Facility, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against defendant Daniel Stasewich. Plaintiff alleges in his complaint that on July 29, 2004, defendant Stasewich removed plaintiff from the segregation cell to escort plaintiff to health care. Defendant Stasewich slammed steel handcuffs around plaintiff's wrists, causing pain to shoot up plaintiff's arms. Defendant Stasewich allegedly stated that plaintiff had it coming. Prisoner Figel allegedly witnessed the incident and heard Stasewich make a racial comment. On September 14, 2004, defendant Stasewich again allegedly used a racial slur and roughly grabbed plaintiff by the shoulders while escorting plaintiff to the segregation yard. Plaintiff alleges that defendant Stasewich threatened him on December 6, 2004, for filing grievances. Plaintiff fears further retaliation from defendant Stasewich. Plaintiff alleges that he submitted a grievance directly to Step III, but the grievance was rejected on December 13, 2004. Plaintiff alleges that he was returned to segregation in 2004, after receiving threats from

defendant Stasewich. Plaintiff requests relief from racial discrimination and degradation, invidious discrimination, harassment and retaliation, including physical contact.

Defendant has moved to dismiss the complaint for failure to exhaust grievance remedies. Plaintiff has moved to amend his complaint. In his motion to dismiss, defendant contends that plaintiff has failed to sufficiently allege and show exhaustion of available administrative remedies. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust available administrative remedies. *See also Booth v. Churner*, 121 S. Ct. 1819, 1823-24 (2001). A district court must enforce the exhaustion requirement sua sponte. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.), *cert. denied*, 525 U.S. 833 (1998); *accord Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *See Booth*, 121 S. Ct. at 1823; *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir.), *cert. denied*, 121 S. Ct. 634 (2000); *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999); *Wyatt*, 193 F.3d at 878-79; *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999).

Defendant has asserted that plaintiff never exhausted his retaliation claim involving the alleged December 6, 2004, incident. Plaintiff submitted a direct Step III grievance on the issue, but the grievance was rejected. Plaintiff was informed to comply with the normal grievance procedures. Plaintiff failed to file any further grievances on the issue. Plaintiff argues that the total exhaustion rule articulated by the Sixth Circuit in *Jones Bey v. Johnson, et al.*, 407 F.3d 801 (6th Cir. 2005), cannot be applied by this court because it conflicts with the Sixth Circuit's holding in *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999). The Sixth Circuit has rejected this argument,

recognizing that the *Hartsfield* decision established no precedent and made absolutely no findings related to the total exhaustion rule. *Rinard v. Luoma*, 440 F.3d 361 (6th Cir. 2006) (rejecting lower court cases that relied upon *Hartsfield* to ignore the express holding of *Jones Bey* which adopted the total exhaustion rule).

Because plaintiff's complaint contains both exhausted and unexhausted claims, dismissal of the complaint is appropriate. Plaintiff argues, however, that the December 6, 2004, incident is not critical or important to his complaint. Plaintiff filed a motion to amend his complaint to delete reference to the unexhausted incident. Plaintiff is essentially requesting to voluntarily dismiss his retaliation claim involving the December 6, 2004, claim. A prisoner may not amend his complaint to cure the exhaustion requirement. *Baxter v. Rose*, 305 F.3d 486, 488-89 (6th Cir. 2002).

Accordingly, it is recommended that defendant's motion to dismiss without prejudice (docket #10) be granted and plaintiff's motion to amend his complaint (docket #13) be denied.

Further, if the court adopts this recommendation the court should decide that an appeal of this action would not be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the court grants defendants' motion to dismiss, the court can discern no good-faith basis for an appeal. It is recommended that should the plaintiff appeal this decision, the court assess the $455 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he should be required to pay the $455 appellate filing fee in one lump sum.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of

this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: May 4, 2006